

DEC 30 1983

ALEXANDER L. STEVAS.

CLERK

NO. 83-755

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

MIRIAM BILLINGS LEDESMA,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the validity of the Petitioner's arrest despite the fact that said arrest was supported by probable cause and constitutionally valid?

2.

Whether this Court should grant a writ of certiorari to examine the denial of Petitioner's motion to suppress evidence discovered during a lawful search of the passenger compartment of the Petitioner's car incident to her lawful arrest?

3.

Whether this Court should grant a writ of certiorari to examine the denial of Petitioner's motion to suppress evidence discovered during a lawful inventory search of the Petitioner's vehicle after it was impounded due to her lawful arrest?

4.

Whether this Court should grant a writ of certiorari to examine Petitioner's allegations that O.C.G.A. § 16-11-131; Ga. Code Ann. § 26-2914 violates the constitutional prohibitions against ex post facto laws and double jeopardy even though said statute defines a separate and distinct offense?

5.

Whether this Court should grant a writ of certiorari to examine the Petitioner's allegations that O.C.G.A. § 16-11-131; Ga. Code Ann. § 26-2914 unconstitutionally prohibits convicted felons from possessing weapons?

6.

Whether this Court should grant a writ of certiorari to examine the Petitioner's allegations that the Supreme Court of the State of Georgia so grievously erred in its review of the Petitioner's direct appeal that the Petitioner was denied some unspecified constitutional right?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner, Miriam Billings
Ledesma, was convicted on December 2,
1982 of the offenses of violation of

the Georgia Controlled Substances Act and possession of a firearm by a convicted felon under Indictment No. A63170 in the Superior Court of Fulton County, Georgia. On December 20, 1982, after trial by jury, Petitioner was sentenced to five years imprisonment on each of the counts as charged, the sentences to run concurrent to each other. However, four years of each of the Petitioner's sentences were probated upon the payment of a fine of \$2000 and the Petitioner serving one year imprisonment.

Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia at Ledesma v. State, 251 Ga. ___, ___ S.E.2d ___ (1983).

Petitioner now seeks a writ of certiorari from the affirmance of her convictions and sentences by the Supreme Court of Georgia.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE PETITIONER'S ARREST WAS
CONSTITUTIONALLY VALID AND
SUPPORTED BY PROBABLE CAUSE
BECAUSE AT THE MOMENT OF HER
ARREST THE FACTS AND
CIRCUMSTANCES WITHIN THE
KNOWLEDGE OF THE ARRESTING
OFFICERS WERE SUFFICIENT TO
WARRANT A PRUDENT MAN IN
BELIEVING THAT THE PETITIONER
HAD COMMITTED AN OFFENSE IN
THE STATE OF MISSOURI.

Petitioner contends that her
arrest was not supported by probable
cause and therefore was
constitutionally invalid. Respondent
asserts that the arresting officers at

the time of the arrest had facts and circumstances within their knowledge which they believed were reasonably trustworthy and which were sufficient to warrant a prudent man to believe that the Petitioner had committed an offense in the state of Missouri.

In its review of the Petitioner's direct appeal, the Supreme Court of Georgia correctly determined the constitutional standard for probable cause to support an arrest. That standard is:

An arrest is constitutionally valid if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officers and of which they had

reasonably trustworthy
information were sufficient to
warrant a prudent man in
believing that the accused had
committed or was committing an
offense.

Durden v. State, 250 Ga. 325, 326, 297
S.E.2d 237 (1982), citing, Beck v.
Ohio, 379 U.S. 89, 91 (1964).

Petitioner had been under
investigation for three and a half
months by police authorities in Fulton
County, Georgia. (M.T. 88). On
September 13, 1982, Fulton County
Police Detective Norton received a
phone call from St. Louis County,
Missouri Police Sergeant Brackney
regarding the Petitioner. Detective
Norton testified that Sgt. Brackney

told him the Petitioner was wanted in Missouri for violations of the Missouri Controlled Substances Act. Detective Norton then requested that Sergeant Brackney send a confirmation of this information either by sending a warrant or a teletype to the Fulton County Authorities. (M.T. 32).

In response to this request, Detective Norton received a teletype from St. Louis, Missouri authorities on September 14, 1982 stating that the Petitioner was wanted in Missouri. Acting in response to this requested confirmation, Fulton County authorities arrested the Petitioner on the evening of September 14, 1982.

The trial court determined, and this decision was affirmed by the Supreme Court of Georgia, that

Detective Norton and the other Fulton County officers involved in the arrest maintained a reasonable belief that the Petitioner was wanted for offenses in Missouri based upon the teletype received. While no party asserted that such information would be sufficient to support a conviction, the Georgia courts determined that this reasonable belief was based upon reasonably trustworthy information, the teletype from St. Louis authorities, and that this information was sufficient to warrant a prudent man in believing that Petitioner had committed an offense in the State of Missouri.

This decision by the Georgia courts is clearly in accord with decisions of the former Fifth Circuit

Court of Appeals for the United States which recognized that police officers may rely on information provided by other police officers, or even by a police computer system, in order to establish probable cause to support an arrest. See United States v. McDonald, 606 F.2d 552, 553-554 (5th Cir. 1979); United States v. Ashley, 569 F.2d 975, 983 (5th Cir.), cert. denied, 439 U.S. 583 (1970). The Supreme Court of Georgia also recognized that this case is not on point with this Court's decision in Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560 (1971), wherein this Court held that the requirements of probable cause could not be defeated merely by having an arrest made by a police officer

ignorant of all the facts of the case. Instead, the Supreme Court of Georgia apparently recognized the distinction between Whiteley and the instant case, that being that all of the Fulton County police officers involved in the arrest of the Petitioner had a reasonable and prudent belief that the Petitioner had committed an offense in the State of Missouri and that a warrant had been issued for her arrest in that state. This belief was fully in accord with the guidelines established by this Court regarding probable cause for arrest, and therefore the Petitioner's arrest was supported by probable cause and constitutionally valid.

For all of the above and foregoing reasons, Respondent respectfully

submits that the Supreme Court of Georgia was correct in its interpretation of the Petitioner's constitutional rights and that the Petitioner's allegations presented herein do not raise any issue for review by this Court.

B. THE SUPREME COURT OF GEORGIA WAS CORRECT IN ITS DETERMINATION THAT THE PISTOL FOUND IN THE PASSENGER COMPARTMENT OF THE PETITIONER'S AUTOMOBILE DURING A SEARCH INCIDENT TO A LAWFUL ARREST WAS PROPERLY ADMITTED INTO EVIDENCE AT THE PETITIONER'S TRIAL.

Petitioner contends that evidence of a pistol being found in the

Petitioner's automobile after her arrest should have been suppressed at trial because said pistol was unlawfully seized by Fulton County police authorities. Respondent submits that the Supreme Court of Georgia properly interpreted this Court's guidelines regarding the search of an automobile passenger compartment incident to a lawful arrest, and determined that the trial court was correct in admitting the pistol into evidence.

In Chimel v. California, 395 U.S. 752 (1969), this Court held that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediate surrounding area. This

area may be searched to remove any weapons from the possible reach of the detained person, and prevent the suspect from concealing or destroying any evidence. Id. at 763.

In order to clarify the scope of such searches, this Court has also established a "bright line" rule, holding that when a policeman has made a lawful custodial arrest of the occupant of an automobile, the policeman may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. New York v. Belton, 453 U.S. 454, 560 (1981). This search includes the search of any closed containers found within the passenger compartment, and the contents of any such container, whether the container

is open or closed, because the justification for the search is not that the arrestee has no privacy interests in the container, but that the lawful custodial arrest justifies the infringement of any privacy interests that the arrestee may have. Id. at 460-561. See also, United States v. Ross, 456 U.S. 798 (1982).

After the Petitioner's lawful arrest, the Petitioner was removed from her automobile. Testimony at the Petitioner's trial placed the Petitioner standing in the doorway of her car or near the car, in such proximity that the Petitioner could have lunged, reached or grasped the weapon, as well as reached any evidence, in the car. (M.T. 35, 80, 153, 154). Upon the search of the

passenger compartment of the
Petitioner's automobile, Fulton County
authorities discovered a zippered bag,
containing a pistol.

Petitioner was charged for illegal
possession of this weapon because such
possession by a convicted felon is
barred by O.C.G.A. § 16-11-131; Ga.
Code Ann. § 26-2914. The Supreme
Court of Georgia correctly determined
that the trial court did not err in
admitting into evidence discovery of
this pistol as the pistol was found in
the passenger compartment of
Petitioner's automobile and was in the
immediate area of the Petitioner's
presence.

Therefore, for all of the above
and foregoing reasons, Respondent
respectfully asserts that the Supreme

Court of Georgia was correct in its interpretation of the Petitioner's constitutional rights and Petitioner's allegations do not present any issue for review by this Court.

C. EVIDENCE OF THE PETITIONER'S POSSESSION OF AN ILLEGAL, CONTROLLED SUBSTANCE UNDER GEORGIA LAW WAS LAWFULLY DISCOVERED DURING A STANDARD INVENTORY SEARCH OF THE PETITIONER'S VEHICLE AFTER ITS IMPOUNDMENT, AND THE ADMISSION OF THIS EVIDENCE AT PETITIONER'S TRIAL DID NOT VIOLATE ANY OF HER CONSTITUTIONAL RIGHTS.

Petitioner asserts that her vehicle should not have been

impounded, a standard inventory search of the vehicle should not have been conducted, and that the illegal, controlled substance found during this inventory search was unconstitutionally admitted into evidence at her trial. Respondent submits that the Petitioner's car was properly impounded after her lawful arrest, the standard inventory search of the Petitioner's vehicle leading to the discovery of the illegal controlled substance was proper, and the admission of this evidence at Petitioner's trial did not violate the Petitioner's constitutional rights.

This Court has repeatedly held that a warrantless inventory search of a vehicle made pursuant to standard police procedures is a reasonable

intrusion which does not violate the Fourth Amendment. South Dakota v. Opperman, 428 U.S. 364 (1976); Chambers v. Maroney, 399 U.S. 42 (1970). The Supreme Court of Georgia properly applied this standard in its review of the Petitioner's direct appeal, and determined that none of Petitioner's constitutional rights had been violated by either the search or the admission of the incriminating evidence at her trial.

Testimony presented at the Petitioner's trial showed that the Petitioner was arrested in the parking lot of a public restaurant. In the Petitioner's car at the time of her arrest, there were a number of items which required safekeeping. Among these items, according to the

Petitioner herself, was \$8,000 in cash. In accord with Fulton County's standard operating procedure No. 23.3(D)(1)(d), the Petitioner's car was impounded, taken to the police impound yard, and an inventory search was conducted. During this search, a plastic bottle of pills was found in the ashtray in the front of the Petitioner's car. The ashtray was open at the time, and the bottle was in plain view of the police officers. Additionally, the bottle had been within easy reach of the Petitioner at the time of her arrest. The contents of the bottle was analyzed and determined to be Phentermine, a controlled substance under Georgia law.

The trial court determined that the search of the Petitioner's car was

in accord with a standard police operating procedure, and that the contraband discovered during the inventory search was properly seized.

In its review of Petitioner's challenge to the admission of this evidence, the Supreme Court of Georgia was correct in its interpretation of federal law and in its determination that none of the Petitioner's constitutional rights were violated by this action. The Supreme Court of Georgia recognized that such an inventory search in accord with this standard operating procedure after a lawful arrest was constitutionally permissible and provided no basis for the exclusion of evidence discovered during the inventory search. Additionally, Respondent notes that

under this Court's guidelines as established by New York v. Belton, supra, the arresting police officers could constitutionally have seized the pill bottle, and thereafter analyzed its contents, during the valid search of the passenger compartment of the Petitioner's vehicle incident to her lawful arrest.

Therefore, for all of the above and foregoing reasons, Respondent respectfully submits that the Supreme Court of Georgia was correct in its interpretation of the Petitioner's constitutional rights and the Petitioner's allegations do not present any issue for review by this Court.

D. THE SUPREME COURT OF GEORGIA
HAS CORRECTLY DETERMINED THAT
O.C.G.A. § 16-11-131; GA.
CODE ANN. § 26-2914 DOES NOT
VIOLATE THE CONSTITUTIONAL
PROHIBITIONS AGAINST EX POST
FACTO LAWS OR DOUBLE JEOPARDY
BECAUSE SAID STATUTE DEFINES
A SEPARATE AND DISTINCT
OFFENSE.

Petitioner alleges that O.C.G.A. §
16-11-131; Ga. Code Ann. § 26-2914 is
invalid because it violates the
constitutional ban against ex post
facto laws and double jeopardy.
Respondent submits that said statute
creates a separate and distinct
offense from the Petitioner's original

felony conviction, and does not punish the Petitioner twice for the same offense.

Under Georgia law:

Any person who has been convicted of a felony by a court of this State or any other State; by a court of the United States including its territories, possessions and dominions; or by a court of any foreign nation and who receives, possesses or transports any firearm commits a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

O.C.G.A. § 16-11-131(b); Ga. Code Ann. § 26-2914. The Supreme Court of Georgia has reviewed the constitutionality of this statute and, in its interpretation of this state offense, determined that it is not an ex post facto law. Landers v. State, 250 Ga. 501, 503-504, 299 S.E.2d 707 (1983). The court found that the Georgia statute defined a separate and distinct offense, that of possessing a firearm after having been convicted of a felony, and that this offense was committed at the time of the possession of the firearm, not at the time of the earlier felony conviction. Id. at 504. The earlier felony conviction was merely one element of the offense defined by

O.C.G.A. § 16-11-131; Ga. Code Ann. § 26-2914, and that the accused was not being punished again for the prior offense. Id.

As this issue raised by the Petitioner is solely challenging the State of Georgia's interpretation of a state law, Respondent asserts that the Petitioner has failed to raise any claim of constitutional dimension. Therefore, Respondent asserts that Petitioner's claim is without merit and does not warrant review by this Court.

In the alternative, should this Court determine that a federal constitutional issue had been presented by the Petitioner, Respondent asserts that the decision of the Supreme Court of Georgia was

correct in its interpretation of constitutional law regarding this issue. This Court has said that for the purposes of determining whether a statute is to be considered ex post facto, the definitive time period to be considered is the date upon which the criminal offense for which the accused is being punished has occurred. Kring v. Missouri, 107 U.S. 221 (1882).

The Georgia statute makes it a crime for a convicted felon to possess a firearm. The crime is not the prior felony, but the subsequent felony of possession.

The Petitioner had been previously convicted on September 13, 1979 and June 16, 1980 of three felonies in the Superior Court of Fulton County, those

being Theft by Taking, Violation of the Georgia Controlled Substances Act, and Theft by Receiving Stolen Property. At the time of the Petitioner's subsequent arrest under the present charges for possession of a firearm, O.C.G.A. § 16-11-131; Ga. Code Ann. § 26-2914 was already in effect. As Petitioner was convicted of a separate offense, that of possession of a firearm, after the Georgia statute had been enacted, there is no violation of the constitutional ban on ex post facto laws.

Additionally, the Petitioner is not being tried nor punished for the same crime twice. According to the test established by this Court in

Blockburger v. United States, 284 U.S. 299 (1932), the prosecution for a second offense constitutes double jeopardy only where each offense requires proof of all the same facts or elements. If each statutory provision requires the proof of a fact which the other does not, there is no double jeopardy problem. Id. In the instant case, Petitioner's prior felony convictions for Theft by Taking, Violation of the Georgia Controlled Substances Act, and Theft by Receiving Stolen Property are totally separate and distinct from the offense of possession of a firearm after a felony conviction. While the Petitioner's prior felony convictions are an element of the subsequent offense of possession, it is the

actual possession of the firearm after the felony convictions which is prohibited under the Georgia law. Therefore, there is no violation of the constitutional prohibition against double jeopardy.

Respondent submits therefore that the Supreme Court of Georgia was correct in its interpretation of the Petitioner's constitutional rights and that the Petitioner's allegations do not present any issue for review by this Court.

E. THE SUPREME COURT OF GEORGIA
DID NOT MAKE ANY
DETERMINATIONS REGARDING THE
PETITIONER'S ALLEGATIONS THAT
O.C.G.A. § 16-11-131; Ga.
Code Ann. § 26-2914
UNCONSTITUTIONALLY PROHIBITS
CONVICTED FELONS FROM
POSSESSION OF FIREARMS, BUT
THE SUPREME COURT OF GEORGIA
CORRECTLY DECIDED THAT THERE
WAS NO CONSTITUTIONAL
IMPEDIMENT IN CHARGING THE
LANGUAGE OF THE STATUTE TO
THE JURY.

Petitioner contends that O.C.G.A.
§ 16-11-131; Ga. Code Ann. § 26-2914
unconstitutionally prohibits convicted
felons from carrying firearms.

Respondent asserts that while the Supreme Court of Georgia did not reach this issue in its decision regarding the Petitioner's direct appeal, the Supreme Court of Georgia correctly determined that there was no error in the trial court's charge to the jury.

It is a well-established principle that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions. Cardinale v.

Louisiana, 394 U.S. 437, 438 (1969).

Such questions which were not raised or decided below are very likely to have an inadequate record, since it was certainly not compiled with those questions in mind. Id. at 439.

Additionally, in the federal system, it is very important that the state

courts be given the first opportunity to consider the application of state statutes in light of any constitutional challenge. Id.

Therefore, Respondent asserts that as the Supreme Court of Georgia did not expressly address this issue in its review of the Petitioner's direct appeal, the record has not been fully developed to present this Court with an adequate foundation for review.

The Supreme Court of Georgia did correctly determine that there was no error in the trial court's charge to the jury. In its review of the constitutionality of O.C.G.A. § 16-11-131; Ga. Code Ann. § 26-2914, the Supreme Court of Georgia found no constitutional error in the purpose or function of said statute. Landers v.

State, 250 Ga. 501, 299 S.E.2d 707 (1983). Additionally, there is no constitutional impediment to a statute forbidding convicted felons from possession of firearms wherein a legislature has determined that such a prohibition is rationally and substantially related to a legitimate goal. See United States v. Ransom, 515 F.2d 885, 891 (5th Cir. 1975); United State v. Lupino, 480 F.2d 720 (8th Cir.), cert. denied, 414 U.S. 924 (1973); United States v. Burton, 475 F.2d 469 (8th Cir.), cert. denied, 414 U.S. 835 (1973). By the passage of this statute, the Georgia Legislature has made such a determination that persons convicted of felonies should not subsequently be permitted to carry dangerous weapons, such as firearms.

Therefore, for all of the above and foregoing reasons, Respondent asserts that the Supreme Court of Georgia was correct in its interpretation of Petitioner's constitutional rights and Petitioner's allegations do not present any issue for review by this Court.

F. THE JUDGEMENT OF THE SUPREME COURT OF GEORGIA IS BASED UPON ADEQUATE AND INDEPENDENT NON-FEDERAL OR STATE GROUNDS AND, THEREFORE, PETITIONER HAS FAILED TO IDENTIFY A FEDERAL CONSTITUTIONAL ISSUE TO BE REVIEWED BY THIS COURT.

Petitioner asserts that the Supreme Court of Georgia so grievously erred in its review of the

Petitioner's direct appeal that the Petitioner has been denied, in some manner, her constitutional rights. Respondent asserts that the decision of the Supreme Court of Georgia was based on adequate and independent non-federal or state grounds and that the Petitioner has failed to identify a specific federal constitutional right which has been violated, thereby presenting no issue for review by this Court.

This Court has consistently adhered to a self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal or state ground, even though a federal question may be involved and perhaps wrongly

decided. Berea College v. Kentucky,
211 U.S. 45, 53 (1908). Fox Film
Corp. v. Muller, 296 U.S. 207 (1935).
In explanation of this policy, this
Court has said:

The reason is so obvious that
it has rarely been thought to
warrant statement. It is
found in the partitioning of
power between the state and
federal judicial systems and
in the limitations of our
jurisdiction. Our only power
over state judgments is to
correct them to the extent
that they incorrectly adjudge
federal rights. And our power
is to correct wrong judgments,
and not to revise opinions.

We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state courts after we corrected its use of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977).

Petitioner is attempting to challenge the interpretation of Georgia law by the Supreme Court of Georgia. In support of his allegation, Petitioner continually argues principles of Georgia law, and

fails to identify any specific federal constitutional right which the Supreme Court of Georgia has violated in its interpretation of state law.

Petitioner seeks to have this Court revise the decision of the Supreme Court of Georgia regarding her direct appeal, but there is no basis or justification for this requested relief. The Supreme Court of Georgia has correctly interpreted all of the issues presented by the Petitioner.

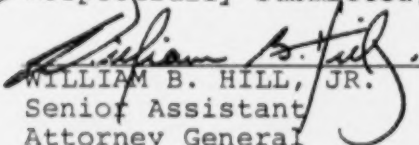
Therefore, for all of the above and foregoing reasons, Respondent asserts that Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that either there exists no federal question for review by this Court as to the Petitioner's claims and, further, there is no substantial

federal question not previously
decided by this Court. Additionally,
the decision sought to be reviewed is
demonstrably in accord with the
applicable decisions of this Court.

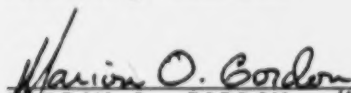
Respectfully submitted,



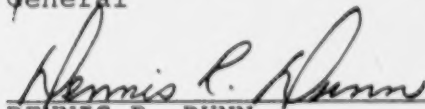
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CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR. a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage thereto:

J. M. Raffauf
Attorney at Law
1477 Snapfinger Road
Decatur, Georgia 30032

(Additional service on next page)

This 14th day of December, 1983.

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